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Supreme Court of the United States.

October Term, 1921.

No. 97.

MacARTHUR BROTHERS COMPANY, *Appellant.*

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
GEORGE R. SHIELDS,
Attorneys for Appellant.

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MacArthur Brothers Company, *Appellant*, v. The United States. } No. 97, October Term, 1921.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

I. STATEMENT OF THE CASE.

This is an action in the Court of Claims based upon a contract for engineering work at Sault Ste. Marie, Michigan. The claim is for damages due to misrepresentations by the United States of the work to be done. The case comes before this court upon claimant's second amended petition, rec. p. 37, the demurrer of the United States, p. 44, and the order sustaining the demurrer and dismissing the petition, p. 47, for reasons given in the opinion of the court, p. 44.

The work to be done comprised a number of items but the question arises under work upon the new Navigation Canal. It is asserted that it was represented by the United States that this work could be done in the dry; that it was impossible to do it in the dry; and that loss resulted to the contractor thereby.

CONTRACT AND SPECIFICATIONS.

The contract and accompanying specifications are made a part of the petition, rec. p. 37. The following are the portions material to the present issue, rec. pp. 12–13 (italics ours):

"I. Excavation of Navigation Canal.

"23. Wet and Dry Work.—That portion of the pro-

posed canal, lying between cross section about 950 west and the railroad embankment at International Bridge, shall be inclosed by cofferdams, and the work required to complete this portion of the canal *shall be performed in the dry*. Material for these cofferdams may be obtained from the excavation or dumps subject to the approval of the Contracting Officer. The above cofferdams are not to be removed under this contract. West of the cofferdam to be located at about 1,000 west, the work will be in the wet.

* * * * * * *

"25. *Canal Excavation in the Dry.—The limits of the canal excavation in the dry* between the cofferdam located at about 1,000 W. and the embankment of the International Bridge are indicated on drawings Nos. 301 and 133. The material to be removed consists chiefly of Potsdam sandstone bed rock, portions of which are hard and in strata 5 feet or more in thickness, while other portions are soft, shaley, and freely seamed. The material overlying the rock is similar to that described in the preceding paragraph. It is estimated that this *material to be excavated in the dry* consists of 200,000 cubic yards of rock and 75,000 cubic yards of overburden; it will all be considered as class B material."

Rec. p. 13:

"All detached pieces of rock, weighing 5 pounds or more, shall be removed from the bottom of the completed excavation over *that portion done in the dry*.

* * * * * * *

"26. Disposal of Excavated Material.—* * * *Material excavated in the dry from the navigation canal* may be used in the construction of cofferdams and dikes so far as it is approved by the Contracting Officer for this purpose. Selected material may also be used for filling timber cribs. All other material from *dry excavation*, not otherwise disposed of to the satisfaction of the Contracting Officer, shall be deposited in specified dumping grounds located within 1,500 feet of the limits

of the work, and roughly graded as directed by the Contracting Office."

Rec. p. 25:

"General Provisions.

"53. Quantities.—The following estimate of materials and work is approximate only. These quantities will be used as a basis for determining the lowest bidder, but the contractor must furnish such materials, appliances and labor as may be required to complete the work, provided the increase or decrease in any of the quantities does not exceed the percentage of variation stated for each class of work. Bidders must name a price per unit for each class of material or work, but the aggregate determined from the prices bid, and the approximate quantities stated for the work let, will be considered as one bid.

Excavation	*Estimated quantity*	*Possible variation*
Class A, dredging navigation canal	47,700 cu. yds.	25%
Class B, *dry work, navigation canal*	275,000 cu. yds.	25%
Class C, dry work, headrace and forebay	15,000 cu. yds.	35%
Class D, dredging, headrace and forebay	15,000 cu. yds.	30%

Rec. p. 28:

"*The excavation in the dry for navigation canal* will furnish material for use in other parts of the work, such as crib filling and the construction of dikes and dams, and must be prosecuted as to furnish the desired class of material at the time it is needed for such other work."

Par. 20 of the specifications, rec. p. 11, says:

"20. Drawings.—Eight sheets of contract drawings, including a map of the locality and general plans of work to be done, may be consulted at the U. S. Engineer

Office at Detroit and Sault Ste. Marie, Michigan, and work is to be based upon these drawings and such others in amplification and modification of the same as may be furnished by the Contracting Officer during the progress of the work.

"The contract drawings include the following:

Sheet No.	*Drawing No.*	*Subject*
1	301	General map of location

* * * * * * *

This drawing No. 301 forms a part of the record on appeal, following p. 48. The Navigation Canal is in the lower left hand corner, marked, "NEW NAVIGATION CANAL." At the west end of this appears a construction marked "PROPOSED COFFERDAM." A line drawn in front of this is marked, "APPROX. LIMITS OF DRY EXCAVATION." The northern side is made by a wall marked "CONCRETE CANAL WALL." The south side of the canal is made by a pier already in existence accompanied by a legend (italics as in original):

> "Center Pier may be sheathed with
> *plank with a clay tow to serve as cofferdam.*"

The cofferdam to be constructed under this contract on the west of the Navigation Canal is shown by this drawing joined to this pier.

The contract provided for payment for the various classes of work by the following provisions, rec. p. 32:

"2. In conformity with the advertisement and specifications hereunto attached, which forms a part of this contract, the said contractor shall furnish all machinery and appliances, do the specified work and furnish the specified material at the rates given in proposal form hereto attached."

The proposal herein referred to, so far as material to the present issue, is found, rec. p. 31:

"In accordance with your advertisement and specifications of July 30, 1910, inviting proposals for Canal and Headrace Construction, St. Mary's River, Michigan, and subject to all the conditions and requirements thereof, a copy of which is hereto attached, and, so far as they relate to this proposal, are made a part of it, we propose to furnish all machinery and appliances, do the specified work, and furnish the specified material at rates as follows:

"For Excavation of Material of 'Class A,' at Two (2) dollars and fifty-five (55) cents per cubic yard, bank measure.

"For Excavation of Material of 'Class B,' at one (1) dollar and fourteen (14) cents per cubic yard, bank measure."

The material of Class A is that done in the wet in the Navigation Canal and that of Class B is that done in the dry in the same place, as appears, p. 5. See explanation of meaning of "dredging," bottom of p. 41.

ALLEGATIONS OF PETITION.

The allegations of the petition may be epitomized as follows:

A. General Misrepresentation.

1. The contract represented that a portion of the work upon the Navigation Canal would be done in the dry and another portion in the wet. See extracts just quoted.

2. It was impossible to do any of the work on the Navigation Canal in the dry and it was all done in the wet. See extracts following.

3. The cost of doing the work in this manner greatly exceeded the cost of doing it in the dry. Record, pp. 42, 43.

B. Special Misrepresentation.

4. The drawings forming a part of this contract showed that a pier constructed under a previous con-

tract of 1908 would be used as a part of the proposed cofferdam. See drawing, opposite rec. p. 48, and legends quoted, *ante*, p. 6.

5. That pier was not completed when this contract was signed. Record, pp. 39–40.

6. That pier was not constructed as required by its specifications. Rec. p. 40.

7. The requirements of its specifications were known to this claimant. Rec. p. 39.

8. The failure of this pier to be constructed according to its specifications was the cause of claimant being unable to do this work in the dry. Rec. pp. 40–42.

Allegations of Impossibility.

The following are the allegations of the petition that it was impossible to do this work in the dry (italics ours):

Rec. p. 40:

"The claimant assumed and believed, as it had a right to do, that the specifications of February 4, 1908, and the contract of March 23, 1908, had been and were being duly and properly carried out by the contractor then performing the contract for that work. If they had been so carried out *the claimant would have been able to perform* under his own contract *in the dry* such portions of the work as were required by the contract to be done in the dry.

Rec. p. 42:

"Owing to the leakage coming through the old North West pier, *it was not practicable for Class "B" excavation to be made in the dry* as by said specifications it was represented that it could be.

* * * * * * *

"Said additional expense was incurred by reason of the work having been done by the previous contractor

in a different manner from what was provided in the specifications, resulting in the work under the claimant's contract *not being capable of being done in the dry* as by the specifications of said contract it had been represented and agreed that it could be.

* * * * * * *

"By reason of the differences found by this claimant from the conditions that would have existed if the work required by the specifications of the previous contract of 1908 had been carried out as thereby required, and the conditions found being different from what were represented in the specifications of the claimant's contract, in that *it was not possible to perform in the dry* the excavation named in paragraphs 23 and 25 of the specifications as required so to be performed in the dry, the claimant incurred a greatly increased expense in carrying out the work under his contract.

"By reason of the conditions encountered being different from what they were represented by the specifications of the contract of 1908, of which specifications the claimant had knowledge at the time of entering into this contract, as well as by reason of the conditions being different from what was represented by the specifications of claimant's contract, in that *the excavation required by its contract to be done in the dry could be done only in the wet* and notwithstanding was required to be so done in the wet by methods applicable to dry excavation, thus causing extraordinary and unusual expenditures not contemplated by either of the contracting parties at the time that the contract was entered into, the claimant sustained the following damages:"

II. ASSIGNMENT OF ERROR.

The appellant assigns the following errors in the conclusion of law and judgment of the Court of Claims:

1. In holding that under the provisions of the contract there was no misrepresentation by the government

of the fact that a certain part of work on the Navigation Canal could be done in the dry.

2. In holding that the contractor had no right to rely upon the assurance of the General Map of Location attached to the contract that the pier constructed under the contract of 1908 was sufficient to form one of the boundaries of appellant's cofferdam.

3. In holding that the contractor had no right to rely upon the fact that the work under the contract of 1908 had been done according to contract, in view of the showing on the General Map of Location of the use to be made of this work.

4. In entering judgment upon the demurrer dismissing the petition.

III. BRIEF OF ARGUMENT.

1. A GENERAL MATERIAL MISREPRESENTATION.

Authorities on Misrepresentation.

In *Hollerbach* v. *United States*, 233 U. S. 165, a contract for repairing an old dam explicitly described the conditions to be found in the existing dam to be removed. These conditions were not found and this court rendered judgment for the excess over the cost had the conditions been as represented. The contract contained provisions, p. 167, substantially the same as those of par. 19 of the specifications, rec. pp. 10–11. The court said, pp. 171, 172:

"A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. * * * We think

this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States* v. *Stage Co.* 199 U. S. 414, 424."

In *Christie* v. *United States*, 237 U. S. 234, the language of the specifications, p. 239, was as follows:

"The material to be excavated, as far as known, is shown by borings, drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material."

Obstructive materials were known to officers of the government and were not shown by the borings. The existence of these materials increased the contractor's cost. In spite of the finding that this concealment was not done with the purpose of misleading, the court said, p. 241:

"It would seem as if there could be only one conclusion from these findings. There was a deceptive representation of the material, and it misled."

P. 242:

"It makes no difference to the legal aspects of the case that the omissions from the records of the results

of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive. *Hollerbach* v. *United States*, 233 U. S. 165. Besides it was admitted at the argument that time did not permit borings to be made by claimants. We think it was error, therefore, to have disallowed the damage resulting therefrom."

In *United States* v. *Atlantic Dredging Co.* 253 U. S. 1, approving the preceding cases, the specifications declared:

"The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand."

There were the usual provisions that bidders must examine the work; that the United States does not guarantee the accuracy of the description; that test borings had been made and can be seen on the maps on file; and that no guaranty is given as to the correctness of these borings representing the entire bottom, "although the general information given thereby is believed to be trustworthy." But the field notes made by the boring parties were not disclosed and were in conflict with the information contained on the map. The court held that this was a material misrepresentation. It summarized the preceding cases by saying, p. 11:

"It is held in those cases 'that the contractor should be relieved, if he was misled by erroneous statements in the specifications.'"

The same principle was earlier stated in *United States* v. *Stage Co.* 199 U. S. 414, repeated in *United States* v. *Spearin*, 248 U. S. 132, 136, and was last stated in *United States* v. *Smith*, 255 U. S. —. See also *Hingston* v. *Smith* (C. C. A., 6th Cir.), 114 Fed. 294. The

broad rule of law governing these decisions was earlier announced in this court in *Smith* v. *Richards*, 13 Pet. 26, 36–37:

"Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believed to be true, is equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Neville* vs. *Wilkinson*, —, 'it misleads the parties contracting, on the subject of the contract.'"

A pertinent expression in line with the above is found in *Mead* v. *Bunn*, 32 N. Y. 275, 280, as follows:

"Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

Application of Authorities.

The cases cited hold that the government must answer for misrepresentations, even though innocent, that a contractor may elect either to rescind or to continue work and recover damages, that specific statements of fact are not nullified by a general caution to the contractor to examine the premises. The real issue here is reduced to the very narrow question whether the statements of the specifications and drawing in this case amount to a misrepresentation calling for the applica-

tion to the contractor's relief of the rule announced in those cases.

The representations of fact in the present case, although not in the same terms as in the cases cited, necessarily involved as distinct a representation of conditions as those in the previous cases. The provision quoted, *ante*, p. 4, from par. 23: "The work required to complete this portion of the canal shall be performed in the dry,"—is not only a mandate but is necessarily a representation that conditions would be encountered which would enable the work to be done in the dry. If the specifications had said directly that the cofferdam, when completed, can be pumped dry, that would be no more a representation of the fact than is the statement that the work is to be done in the dry. The heading of par. 25, quoted, *ante*, p. 4, "Canal Excavation in the Dry"—is a distinct representation that a part of the excavation can be performed in the dry. The statement of the limits of the canal excavation in the dry, quoted, *ante*, p. 4, is a representation that the excavation can be performed in the dry within those limits. The other references quoted, *ante*, pp. 4, 5, in regard to work in the dry are all representations that the work can be done in the dry. The legends on the drawing, quoted, *ante*, p. 6, pointing out the limits of dry excavation and showing how the pier could be used to this end, are very definite representations of the same fact.

The true test is to put ourselves in the position of the contractor when these specifications were presented for bidding and signature. Could there be any doubt in its mind that the government was offering a piece of work to be done in the dry? Could it have occurred to the contractor that the entire excavation for the Navigation Canal would be done under wet conditions? The repeated language is entirely inconsistent with the idea

that the excavation could not be performed under conditions represented by the term "in the dry."

MISREPRESENTATION BY FACTS.

In *United States* v. *Gibbons*, 109 U. S. 200, the contract was for the rebuilding of a shop. The specifications contained the following clause, upon which the case turned, p. 201:

"The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated in the plan by new work."

The contract was made in pursuance of proposals, invited by an advertisement, in which it was stated that "persons desiring to bid must necessarily visit the yard and examine the present condition of the works, and can there see the plans and specifications to enable them to bid understandingly." The contractor was told by various subordinate local officers that the walls still standing would be a part of the new work. They turned out to be useless and had to be torn down. This court held the United States responsible for the resulting cost, saying, pp. 204-205:

"The foundation and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done."

In *Horgan* v. *The Mayor*, 160 N. Y. 516, the syllabus reads, par. 2:

"A contract for clearing and concreting the bottom of a park lake for the city of New York contained pro-

visions that the contractor should drain off all water from the bottom during the progress of the work, that he should furnish all pumping or bailing required for the proper prosecution of the work, and that he should satisfy himself as to the nature and amount of the work to be done, by personal examination of the location. There was an outlet pipe in the bottom of the lake the gate of which only was visible on the contractor's personal examination of the proposed work, but on his attempting to draw off the water thereby in the progress of the work, the underground pipe or sewer proved to be obstructed and failed to remove the water for a considerable depth."

The contract contained a clause that loss arising "from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the work * * * shall be sustained by said contractor." The court treated this gate as a representation that the lake could be drained and gave damages for the misrepresentation, saying, p. 522:

"It was, of course, impossible when the plaintiff went upon the ground to examine the proposed work to see more than the outlet gate and the size thereof; whether the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises."

And again, pp. 522, 523:

"It seems to us a strained and unjust construction that would require the plaintiff under these provisions to remove, if necessary, the entire body of water from the pond. This latter work is a subject upon which the minds of the parties could not have met, and the plaintiff in his estimates did not consider that he was called upon to pump out this great body of water lying upon an area of six acres. It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer through the outlet the city had constructed for that purpose."

These two cases go farther than the present. The misrepresentation in each of them was by a fact and not in words. In the one case it was held that the presence of the standing walls was an authoritative representation that they "were uninjured by the fire"; in the other that the existence of the gate was a representation that drainage existed.

Additional Authorities.

Some additional authorities are cited as bearing upon some phases of this case.

In *Water Commissioners* v. *Robbins*, 82 Conn. 623, plaintiffs represented that the work to be done involved approximately given amounts of excavation, spoil, concrete, masonry and other classes of work, statements, p. 624, "made as embodying the results of competent expert engineering investigation." These were held to be "representations of fact, rather than of opinion." Plaintiffs were held responsible for their falsity, upon the work requiring quite different quantities.

In *Watson* v. *Brown*, 113 Ia. 308, plaintiff represented that his machine would make salable woven wire fence. It failed to do so. The court saying that "plaintiff manifestly knew more of it than any other person could learn by inspection," p. 311, held that the misrepresentation avoided the contract.

In *Westerman* v. *Corder*, 86 Kans. 239, defendant was held bound by a representation made in good faith of title to land sold by him and was enjoined from asserting title under a subsequent deed from a third party.

See *H. W. Abts Co.* v. *Cunningham*, 95 Neb. 836; *Davis* v. *Mitchell*, 72 Ore. 165; *Hale* v. *Philbrick*, 42 Ia. 81; *Faribault* v. *Sater*, 13 Minn. 223; *Henderson* v. *Henshall*, 54 Fed. 320, holding that a party is bound by

misrepresentations, even if he could by the exercise of diligence have discovered their falsity.

In *Dushane* v. *Benedict*, 120 U. S. 630, the rule is stated in regard to implied warranty of sales, having a close analogy to the rule claimed in regard to the representations here, p. 636:

"When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose."

2. A SPECIAL MATERIAL MISREPRESENTATION.

The general representation contained in the specifications and already considered—that this work could be done in the dry—was accompanied by a special representation. It has already been seen, *ante*, p. 8, that one of the contract drawings, following rec. p. 48, showed the approximate limits of dry excavation in the Navigation Canal and an existing pier as a part of the cofferdam for the work to be done there, with this legend:

"Center Pier may be sheathed with *plank with a clay toe to serve as cofferdam.*"

This pier was constructed by another contractor under the contract of 1908, the terms of which were known to claimant. That work was not completed at the date of the present contract. Certain construction was prescribed therein which, if carried out, would have permitted the pier to be used as shown on the drawing and the work to be done in the dry. The petition, rec. p. 39, states the details. The contractor had a right to accept the drawing and its legend as an assurance by

the United States that the pier could be so used. The contractor read this assurance in the light of the former contract with the United States and was satisfied by it that the work under the previous contract, vital to the due execution of the present contract, had been duly performed. Whatever may be the force of the position of the Court of Claims, rec. p. 47, that this earlier contract was not, taken by itself, a representation for which the United States can be held liable in a suit upon the present contract, three things may surely be said of it:

1. That the drawing showing the existing pier as a part of the cofferdam to be constructed and the accompanying legends, quoted, *ante*, p. 6, justified the contractor in concluding that the specifications of the former contract were properly carried out so as to enable work to be done in the dry. The former contract was a supplementary representation confirmatory of the drawing and its legends.

2. Our first contention, *ante*, p. 14, that the specifications themselves were a sufficient representation that the work could be done in the dry, is greatly strengthened by the fact that, had the contract of 1908 been properly carried out, the work under the present contract could have been done in the dry. The contract of 1908 is therefore at least a confirmation of this contention and aggravates the misrepresentation of fact contained in the specifications.

3. Whether the work could be done in the dry was not only a fact specially known to the officers of the United States, but it was dependent upon their action in properly enforcing the contract of 1908.

CONCLUSION.

It is respectfully submitted that the court below was in error and that its judgment should be reversed for the following reasons:

(1) That the specifications and drawings annexed thereto clearly represented that this work could be done in the dry;

(2) That the amended petition to which the demurrer has been filed states definitely that it was impossible to do the work in the dry;

(3) That the drawing showing the use of the pier built under the contract of 1908 and the legend declaring that it may be used, justified the contractor in acting upon the belief that the pier was constructed in accordance with the provisions of the contract of 1908 and that the work therefore could have been done in the dry;

(4) That the additional expenses to which the contractor was put, beyond the normal cost of work in the dry, is due to these misrepresentations and should therefore be repaid.

It may be said here as was said in *United States* v. *Atlantic Dredging Co.* 253 U. S. 12, that the recovery which would result from reversing this judgment "is simply compensatory of the cost of the work, of which the Government got the benefit."

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